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No. 01-1464

Supreme Court, U.S.
FILED
MAY 7 2002
CLERK

IN THE

# Supreme Court of the United States

VISA U.S.A. INC. AND
MASTERCARD INTERNATIONAL INCORPORATED,
*Petitioners,*

v.

WALMART STORES, INC. *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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May 7, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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## REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Virtually every argument in the opposition brief reduces to two points: that petitioners had a full, rigorous review of the merits of the class certification motion in this case and lost, and that "[t]his case does not present any conflict among the circuits" on the "proper standards for evaluating class certification evidence." Opposition ("Opp.") at 2. As we show *infra*, this argument treats as irrelevant the Second Circuit's articulation of its very lenient standard for assessing class certification motions under Rule 23(b)(3) and pretends that the courts below applied a standard different from the one set forth in their opinions. In fact, the lower courts plainly identified the legal rule that governed their assessment of the record on class certification; that rule conflicts with the rule adopted in other courts of appeals; and the petition properly seeks review of that rule and resolution of that conflict.

Specifically, the Second Circuit held that a district court is barred from resolving competing expert submissions on class certification issues overlapping with the merits of a case and may certify a class as long as the plaintiffs present merely admissible evidence in support of the Rule 23(b)(3) prerequisites. The court also authorized the postponement of the determination whether a class action is manageable despite identified problems with the management of individual class members' damage claims. Applying this relaxed standard, the court found that plaintiffs' expert's submission in support of class certification was not fatally flawed and certified a class of four million plaintiffs seeking damages of $100 billion.[1]

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[1] Respondents assert that petitioners "invented" the $100 billion damages figure "for its apparent shock value." Opp. 4 n.2. That contention is contradicted by the report of Respondents' own expert economist. Fisher Report at 123 (Apr. 4, 2000); Fisher Rebuttal Report at 51 (Apr. 26, 2000). Petitioners cannot quote Dr. Fisher's precise numbers, because Respondents have designated both Reports "Highly Confidential" under the protective order entered by the district court.

Because respondents wish away the Second Circuit's holding, they do not confront the serious nature of the conflicts raised by the Petition, nor do they even address petitioners' demonstration that the issue presented is both recurring and vitally important to the fair and just administration of civil litigation. Even respondents do not dispute that class certification has a coercive effect on defendants that is unrelated to the merits of their defense. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). Indeed, certification in this case is "brutally coercive" because of the size of the class and the damages asserted. See Pet. App. 36a. Nor do respondents contest the importance of the fair and uniform administration of Rule 23 to civil litigation and to affected classes of plaintiffs and defendants. It is no exaggeration to say that a class certification can result in financial devastation for employers, industries, and entire segments of the economy and alter policies and practices whose legality has never been adjudicated. See Br. of the American Bankers Ass'n; Br. of the Alliance of Auto. Mfrs. This Court should grant review to ensure that Rule 23, which it promulgated, is correctly and fairly interpreted and applied.

Petitioners address in turn each of respondents' attempts to divert attention from the class certification holding that warrants this Court's review.

1. In this case, the district court and the Second Circuit clearly articulated the legal standard for assessing a motion for class certification, and applied that lenient standard in granting the motion for certification. Respondents now claim, however, that although the courts below specified a standard in which the resolution of evidentiary conflicts is prohibited (or at least unnecessary), the courts nonetheless conducted the "rigorous" or "exhaustive analysis" required by Rule 23(b), rather than applying the deferential standard articulated in the opinions. Not only is that improbable on its face, it is belied by the language of the decisions below.

In support of the motion for class certification, respondents' expert, Professor Carlton, submitted declarations stating his belief that the facts necessary to establish a classwide recovery could be proven. In response, petitioners' expert, Professor Schmalensee, submitted a declaration explaining the numerous, improbable assumptions on which Professor Carlton's theory of classwide injury rested. Respondents spend substantial time and energy attacking Professor Schmalensee and discussing the relative merits of the two experts' positions. This effort entirely misses the point.

The legal issue presented by the petition is not which expert is ultimately right about the merits of respondents' antitrust claims but, instead, the appropriate standard for deciding class certification motions under Rule 23(b)(3).[2] Here, despite the fact that the expert declarations were addressed solely to Rule 23 issues, the district court and the court of appeals both concluded that they were *forbidden* to decide which expert was correct on the Rule 23 issues at this stage of the proceedings. Instead, the courts below decided that Professor Carlton's submission that the Rule 23 prerequisites could be met was not "fatally flawed" and, thus, the class had to be certified. Pet. App. 11a.

The district court first explained that "a 'weighing of the evidence is not appropriate at [the class] stage of the litigation." Pet. App. 87a. Indeed, the court stated that it was not "the 'trier of fact'" and that it was "expressly forbidden" at the class certification stage to "delve into the merits of an expert's opinion, or indulge 'dueling' between opposing experts." *Id.* at 68a (citing *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Caridad* v. *Metro-North Commuter*

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[2] Respondents also irrelevantly assert that no other payment networks impose requirements similar to the Honor All Cards rule. Opp. 5. This assertion is fully refuted by the record evidence concerning, for example, American Express and regional ATM networks. *See* J.A. at 784-85, 793-96, 797-99, *In re. Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001) (No. 00-7699) ("*Visa Check*").

*R.R.*, 191 F.3d 283, 292 (2d Cir. 1999)).[3] Thus, the district court held that it had to certify the class if the "'assertion of class status is at least colorable,'" Pet. App. 87a, and even if "factual or legal underpinnings of the [class certification] are undermined once they are tested under a more rigorous standard than *Caridad* allows," *id.* at 97a.

The Second Circuit affirmed the legal standard for assessing class certification evidence employed by the district court. The court admonished that a motion for class certification is "not an occasion for examination of the merits of the case," but rather is only to "ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law." Pet. App. 11a. See also *id.* at 11a-12a (authorizing class certification if plaintiffs have "'a reasonable probability'" or a "'colorable method'" or a method that is not "'so insubstantial as to amount to no method at all'").

There is no doubt that the district court addressed various issues raised in the Schmalensee report. But, equally plainly, the court viewed that "evidence" and the issues it raised through the prism of the restrictive legal standard it considered itself bound to apply. The Second Circuit held that this was the *correct* approach. In the face of those clear articulations, respondents' suggestion that the courts actually applied some different standard or approach is untenable.

In sum, respondents cannot magically make the legal standard articulated and applied by the courts below disappear. The Second Circuit has established a lenient, incorrect legal standard and applied it to this case. If, as we show *infra*, that holding conflicts with the standard established and applied in other circuits, then the petition should be granted.

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[3] *See also* Pet. App. 69a n.6 (a "lengthy, substantive critique of the findings of the plaintiffs' expert" is "not permitted in this circuit on a motion for class certification") (citing, *inter alia*, *Caridad*, 191 F.3d at 292).

2. Respondents' second argument – that the decision below does not conflict with the decisions of other circuits – also rests on the erroneous premise that the Second Circuit did not apply its articulated standard for assessing evidence of the prerequisites for class certification. Any fair minded reading of the opinion below compared to those issued by the Seventh, Third and First Circuits plainly shows that fundamentally different legal standards are applied in different parts of the country in deciding class certification.

Respondents' attempt to distinguish *West* v. *Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002), is particularly unavailing. In that case, far from resting on "an empty factual record," Opp. 17, the district court granted class certification because "each side ha[d] the support of a reputable financial economist . . . and [the court] thought the clash enough by itself to support class certification and a trial on the merits." *West*, 282 F.3d at 938. The Seventh Circuit reversed that decision, stating that "[a] district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits." *Id.* It is irrelevant that the district court in *West* wrote a short opinion, while the district court here wrote 15 pages, Opp. 18, before declining to decide whether plaintiffs' expert had actually demonstrated that common issues would predominate. The critical point is that, in the Seventh Circuit, under Rule 23(b)(3), "[t]ough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives," *West*, 282 F.3d at 938. In contrast, in the Second Circuit, the tough questions can be ducked, and a class may nonetheless be certified.

Respondents also breezily dismiss other conflicting court of appeals' decisions as standing only for the proposition that a court may go beyond the pleadings in deciding whether to certify a class under Rule 23(b)(3). See Opp. 18-19 (citing

cases discussed in the Petition at 15-17).[4] These decisions are all consistent with that proposition, but they also establish a standard for assessing class certification evidence that simply cannot be reconciled with the Second Circuit's legal analysis. In *Szabo* v. *Bridgeport Machines, Inc.*, for example, the court explained that "if some of the considerations under Rule 23(b)(3) . . . overlap the merits . . . then the judge must make a preliminary inquiry into the merits" and "resolve the dispute before allowing the case to proceed." 249 F.3d 672, 676-77 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001). In each of the other cited decisions, too, the court of appeals has mandated "'whatever legal and factual inquiries are necessary under Rule 23.'" See Pet. 16-17. There is plainly a broad conflict among the courts of appeals on the recurring and important question of the appropriate standard for assessing class certification evidence.

3. Respondents assert in passing, Opp. 21, that, in the courts below, petitioners did not contend that a court deciding a class certification motion had to resolve all factual and legal questions necessary to determine whether the prerequisites of class certification exist. This contention, which is based on snippets in pleadings taken out of context, is flatly contradicted by petitioners' consistent arguments below that

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[4] Respondents also argue that the Second Circuit's decision could not conflict with decisions of the Seventh and Third Circuits, because district courts in the latter circuits have cited the district court decision in this case with approval. *See* Opp. 20. The best way to determine whether courts of appeals' decisions are in conflict is to read the decisions themselves, which, as we have shown, adopt wholly inconsistent standards. Respondents' further citation of district court decisions refusing to resolve a "'battle of the experts'" at the class certification stage, *id.* at 20-21, simply illustrates the breadth of the conflict and the vastly differing approaches courts take to certification. *See also* Pet. 17 n.2. Particularly given that class certification decisions take place at the district court level and, even now (under amended Rule 23(f)) are not routinely reviewed, the pervasiveness of the conflicts in approach underscores the need for this Court's review.

the judge must decide whether plaintiffs have *proven* the facts essential to class certification.[5] The question of the appropriate standard for assessing class certification evidence is plainly presented by the decision below.

4. Based on the faulty premise that there is no conflict among the courts of appeals on the standard for assessing class certification evidence, respondents also incorrectly assert that petitioners' unstated agenda must be to overturn *Eisen* v. *Carlisle & Jacquelin*. That is untrue. What we urge the Court to do is to eliminate confusion among lower courts concerning the proper meaning of *Eisen*, and its relationship to this Court's other class action decisions requiring "rigorous analysis." See *General Tele. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982); *Coopers & Lybrand*, 437 U.S. at 473.

On the one hand, *Eisen* holds that courts may not decide the merits of a suit in order to determine whether to certify a class. 417 U.S. 156, 177 (1974). Indeed, respondents implicitly concede that many district courts have misinterpreted *Eisen* by holding that in the class certification context, it bars decision of any factual or legal question that overlaps with a merits determination. See Opp. 22; Pet. 18-20. On the other hand, this Court's decisions in *Falcon* and *Coopers & Lybrand* require district courts to conduct a "rigorous analysis" before certification. The language of Rule 23(b), which requires a court to "find[]" that Rule 23(b)'s

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[5] *See, e.g.*, Pet. for Reh'g & Reh'g En Banc at i, *Visa Check*, 280 F.3d 124 (2d Cir. 2001) (No. 00-7399) (raising the following points for review: "In Passing Upon A Motion For Class Certification, It Is Improper For The Trial Court To Accept The Plaintiffs' Expert Report So Long As It Is Not 'Fatally Flawed,'" and "A Class May Not Be Certified Unless The Trial Court Is Able To Determine At The Time Of Certification That Each Of The Requirements Of Rule 23 Can Be Met Without Sacrificing Defendants' Substantive Rights."); Br. of Defs.-Appellants at 14-15, 17-18, 22-27, *id.*; Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Class Certification at 20, *Visa Check*, 192 F.R.D. 68 (E.D.N.Y. 2000) (No. CV-96-5238).

prerequisites have been met, Fed. R. Civ. P. 23(b), reinforces the rigorous nature of the class certification inquiry.

This Court, however, has not explicitly determined the *nature* of the rigorous judicial inquiry that is required or permissible where the legal and factual questions raised by a motion for class certification overlap with the merits of a case. Specifically, the Court has not decided whether the district court must, *as a trier of fact* for Rule 23 purposes, actually resolve factual and legal disputes presented by the Rule 23 criteria. Based on their differing readings of this Court's authority, the lower courts are confused and in conflict about the standard for assessing class certification evidence that overlaps with merits issues. See Pet. 18-20. The need for resolution of this important question that rests at the intersection of this Court's Rule 23 case law is another strong reason to grant the petition.

5. Finally, respondents have a single response to petitioners' demonstration that the Second Circuit's decision creates a conflict among the courts of appeals by its simultaneous certification of the class and postponement of serious and apparent manageability questions. They contend that there were no "existing and identifiable manageability problems" present in this case, Opp. 24 (emphases omitted), and that this fact distinguishes the instant case from those cited in the Petition at 20-22.

Unlike respondents, however, both courts below recognized that the class certification motion presented significant manageability questions. The district court recognized that merchants might have an obligation to steer customers away from using off-line debit cards in order to mitigate their individual damages and therefore that the four million class members' damages might have to be individually tried. See Pet. App. 91a-92a n.19 ("'[e]ven the necessity of individual trials on damages may be fatal if the class numbers in the thousands or millions'") (quoting 2 Areeda & Turner, *Antitrust Law* § 332c, at 157 (1978)). But, the district court

postponed determination of whether petitioners' mitigation defense would render the class action unmanageable and certified the class, holding that:

> It may well be appropriate to address before trial the merits of some of defendants' damages-related arguments, and whether, upon resolution of those issues, there remains a "practical means" to litigate the damage claims of class members. [*Id.* at 92a n.19.]

The court of appeals affirmed this analysis and decision, approving the postponement of decision on the manageability question. In dissent, Judge Jacobs opined that "[t]he manageability problem in this case has been 'apparent' from the outset and is apparent right now." Pet. App. 40a. See *id.* at 41a (reciting record evidence that shows the mitigation defense "may 'have force'" and stating that "[i]t makes no sense to provide individualized notice to millions of merchants before the court has devised a 'practical means' for trying the issues presented").

The courts below did *not* hold that the manageability issue raised by petitioners was unripe or speculative. Instead, they held that under Rule 23(b), the district court may postpone decision of serious manageability questions and still certify a class.[6] Thus, the actual holding of the courts below (as

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[6] Respondents also appear to contend that petitioners did not argue below that the ability of merchants to steer gave rise to individualized issues rendering the class action unmanageable. But petitioners consistently argued that merchants' ability to steer made individualized determinations of injury necessary. *See* Pet. App. 89a-90a. And, while the district court rejected the argument that steering could eliminate all of a merchant's damages, it acknowledged that the steering argument could "have force" as an argument for mitigation of damages and the necessity of individualized damages determinations. *Id.* at 90a-91a & n.19. This argument was clearly presented to and decided by the court of appeals. *See, e.g.*, Reply Br. of Defs.-Appellants at 21, *Visa Check*, 280 F.3d 124 (2d Cir. 2000) (No. 00-7699) ("[t]he district court acknowledged that individual damages issues might overwhelm common issues of liability and thus defeat certification"); Pet. App. 21a-23a. The question whether

opposed to the strawman set up in the opposition brief) conflicts with the language and structure of Rule 23(b), with this Court's decisions requiring a court to conduct a rigorous analysis to determine whether the prerequisites of class certification (including manageability) have been satisfied, and with the decisions of other courts of appeals. Pet. 21-22.

As the latter decisions show, where, as here, there are "serious problems [with class certification] now appearing, [the court] should not certify the class merely on the assurance of counsel that some solution will be found." *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977) (en banc). After the petition in this case was filed, the Seventh Circuit reversed the certification of a nationwide class seeking damages based on the abnormally high failure rate of Firestone tires on Ford explorers, stating that, in light of the variable facts for individual plaintiffs' claims, "this litigation is not manageable as a class action even on a statewide basis." *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, No. 02-1437 et al., 2002 WL 831990, at *4 (7th Cir. May 2, 2002).

Here, however, the district court impermissibly put the manageability requirement of Rule 23(b) to the side, stating that it would return to the question in the future. However, with a certified class of four million, someday may never come, notwithstanding petitioners' defenses. It is precisely for this reason that Rule 23(b) requires courts to enforce "actual, not presumed, conformance" with its prerequisites. *Falcon*, 457 U.S. at 160.

## CONCLUSION

For the reasons set forth in the petition and in this reply, the petition for certiorari should be granted.

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Rule 23(b)(3) authorizes a district court to certify a class while postponing a manageability determination is thus squarely presented by this case.

Respectfully submitted,

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